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BRIEF AS AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION SUPPORTING RESPONDENT

INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association ("NELA") is a voluntary organization started in 1985 of over 2,000 attorneys who specialize in representing individuals in controversies arising from the workplace. It is the country's only professional membership organization of lawyers who represent employees in employee benefits, employment discrimination, wrongful discharge and other employment-related cases.

NELA has devoted its efforts to supporting precedent-setting litigation and legislation affecting the rights of individuals in the workplace. NELA has an interest in the application of the Employee Retirement Income Security Act ("ERISA") because the clients of NELA members frequently have employee benefit claims. NELA is qualified to brief this Court on the implications of its decision in this case, having participated as amicus curiae in numerous other cases involving ERISA and other employment laws, including *Varity Corp. v. Howe*, 64 U.S.L.W. 4138 (March 19, 1996), *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 114 S.Ct. 517 (1993), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).[1]

SUMMARY OF ARGUMENT

Paul Spink worked for Lockheed Corporation from 1979

[1] The parties have consented to the filing of this brief. Correspondence reflecting the parties' consent has been lodged with the Clerk.

to 1990. Lockheed informed him in 1984 that it had excluded him from participation in the employees' pension plan because he was over age 60 at the time he was hired. JA 78. In 1986, Congress enacted the Omnibus Budget Reconciliation Act which, in pertinent part, prohibited businesses from excluding employees from pension plan participation based on their age. Lockheed complied with that part of the law, but when Spink retired it limited the years of service used in computing his benefit accruals to his service after December 25, 1988. In 1990, shortly before he retired, Lockheed offered Spink and other older employees an extra three years of credited service for benefit accruals under a retirement incentive program, but it conditioned the offer on a signed general release in favor of Lockheed of all employment litigation claims that the employee might possess, including ADEA and ERISA claims. Spink refused to sign the waiver and this litigation ensued.

Lockheed's purchase of general releases from employees using pension plan assets held in trust exclusively to provide benefits to participants and beneficiaries violates ERISA's Section 406's prohibited transaction rule. ERISA does not allow "parties-in-interest," which include the company, company officers, other fiduciaries, union officials, or relatives or affiliates of the above, to extract extra consideration from employees as part of the price to receive plan assets that are held in trust.

The 1986 OBRA amendments were enacted to stop discrimination on the basis of age under company pension plans. Lockheed's reduction of Spink's benefit accruals on account of his attainment of age 60 before Lockheed hired him violates the rule in OBRA Sections 9201 and 9202 against imposing a limit on "the number of years of service or years of participation

which are taken into account for purposes of determining benefit accrual under the plan" based on the employee's attainment of any age.

ARGUMENT

I. Lockheed's Purchase of General Releases from its Employees With Pension Plan Assets Violates ERISA Section 406

In enacting ERISA, Congress treated pensions as deferred wages that the employee earns with his or her labor.[2] As the Chamber of Commerce recognizes, the theory that employers paid pensions and fringe benefits as gratuities was rejected even before ERISA. *See Inland Steel Co. v. NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) and, e.g., ABA Section of Labor and Employment Law, *Employee Benefits Law*, xxi and 249 (BNA 1991).

As a result, everyone now agrees that businesses receive valuable consideration from the labor that employees offer in order to earn pension benefits and that businesses, in certain instances, receive, or perceive that they receive, benefits from voluntary terminations of employment through retirement.

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[2] *See, e.g.*, 2 ERISA Leg. Hist. 1605 (floor statement of Senator Harrison Williams, the chief Senate Democratic sponsor of ERISA: "pensions are not gratuities, like a gold watch bestowed as a gift by the employer on retirement. They represent savings which the worked has earned in the form of deferred payment for his labors"); 2 ERISA Leg. Hist. 1609 (floor statement of Senator Jacob Javits, the chief Senate Republican sponsor: "The private pension plan is a means for transferring earnings during the working years into income for a decent living in the older years. The worker 'works' for that pension the same way he 'works' for his wages or salary").

Service for the employer and retirement from the employer's service are the incidents of employment that an employer obtains in exchange for pension benefits under ERISA plans. *See* Dan M. McGill, *Fundamentals of Private Pensions* (5th ed.) at 19-20 (pensions are deferred wages for employee's labor; pension plans also permit employers to encourage older employees to retire in orderly fashion).[3] The question here is: "Can an ERISA plan require additional, non-incidental consideration from the employee running in favor of the employer in exchange for the payment of benefits with trust assets without violating ERISA's prohibited transaction rule?"[4]

The facts here show a self-interested exercise of authority over the disposition of pension plan assets to obtain valuable consideration for an employer: Lockheed dictated that the use of trust assets to pay extra benefits be conditioned on the employee's execution of a general release running in its favor. The increased pension benefit that Lockheed offered Spink if he executed the general release was about $120 per month.[5] For an

[3] In law, an "incident" may be defined as something directly and immediately relating to something else. *Webster's Third International Dictionary* (1993 ed.).

[4] If ERISA Section 406 did not prohibit these transactions, the Ninth Circuit would on remand need to examine alternative arguments that the transactions are (a) in breach of the fiduciary duty to act solely for participants and beneficiaries, (b) cause plan assets to inure to the benefit of the employer, and (c) unlawfully condition the receipt of vested benefits in violation of ERISA. The Solicitor General recognizes that the receipt of vested normal retirement benefits may not be conditioned on a release. SG Br. at 21 n.14. The benefits at issue here are vested retirement benefits. See JA 51 and 56.

[5] Three extra years of pension credit x 1-1/2% x ~$33,000 "excess base rate of pay" salary ÷ 12 months ≈ $120 month.

employee like Spink who was age 72, this was worth about $10,000. As the Ninth Circuit found, Lockheed was, in effect, offering to "writ[e] checks drawn on pension funds to buy the releases in question" for itself. JA 90.[6]

Lockheed implicitly asserts that the consideration required for an employee to obtain plan benefits can never constitute a prohibited exchange or use of plan assets under ERISA, even if the consideration is valuable non-incidental consideration that goes to an employer or another party-in-interest. This proposition would permit plans to impose any extraneous conditions on plan benefits that employers want for their own account. Under Lockheed's position, employers could condition pension benefits on releases, with costs and penalties for any breaches, of not just sex, race and age discrimination claims, but assault, defamation, harassment and other tort claims. Pension benefits could also be conditioned on waiver of contract claims, including stock option and other benefit claims, on releases of copyright and patent claims, on post-employment trade and business secrecy agreements, on payment of any charges that are outstanding against the employee at the time of retirement, such as for work uniforms and tools, travel expenses, employee contributions to non-ERISA plans, or extensions of credit from other departments. Pension benefits could also be

[6] One of Lockheed's amici also describes the transaction vividly: The "employer buys a litigation-free future in exchange for awarding substantial extra benefits to employees." EEAC Br. at 16.

Lawfulness aside, it is, of course, easier for Lockheed to purchase general releases with someone else's money, including money held in trust. No one questions Lockheed's right to purchase general releases with its own money, including with severance benefits funded with corporate assets.

conditioned on paying fees to the employer, or even on lending money to financially-strapped employers. Employers could also condition pensions on uncompensated off-hours work. The list would be virtually endless. Under Lockheed's argument, the conditions would not even need to be consistent: Groups of favored employees could receive their pension benefits with few conditions while groups of less favored employees could face the entire gamut of conditions. Lockheed's position seeks to pull pension plans back to the time when pensions were treated as gratuities that employers could condition in any manner and withhold at their discretion.

Lockheed's position cannot withstand review for compliance with ERISA. To insulate trust assets that are to fund pensions from misuse by employers, Congress provided that assets held in trust are to be used for the exclusive purpose of providing benefits to participants and beneficiaries and it prohibited transactions with trust assets that exchange, transfer or use plan assets for the benefit of the employer and certain other parties-in-interest. ERISA's exclusive purpose rule, its anti-inurement rule in ERISA Section 403(c) and the prohibited transaction rule all prevent the use of trust assets for other purposes. To alleviate the prohibited transaction rule's impact where appropriate, Congress enacted specific exemptions to allow benefits to be paid to fiduciaries and other parties-in-interest under ordinary conditions. For example, ERISA Section 408(c) exempts a fiduciary's receipt of a pension benefit from the plan, provided that the benefit is "computed and paid on a basis which is consistent with the terms of the plan as applied to all other employees." Under Section 408(a), the Secretary of Labor has authority to grant class and individual exemptions that are "administratively feasible," "protective of

the rights of participants and beneficiaries of the plan," and in their interests. But if all conditions on the payment of benefits were exempt, as Lockheed contends, a bazaar of individual and small group exchanges would substitute for the statutory exchange of labor and retirement for pensions.

The proposition that Lockheed asserts is also belied by the absence of any distinction in ERISA Sections 3(14) and 406, 29 U.S.C. §§ 1002(14) and 1106, between a "party-in-interest" employer like Lockheed, on the one hand, and other "parties in interest." Certainly, Lockheed would not contend that it is permissible under ERISA Section 406 to require employees, in exchange for receiving benefit payments from trust assets, to deliver valuable consideration to one of the Lockheed-selected fiduciaries who are charged with administering the plan, to one of Lockheed's chief executives, to a union official whose members are covered by the plan, or to a relative or affiliate of any of these persons or entities. The statutory text does not distinguish Lockheed and make it eligible to receive consideration that these other parties in interest are prohibited from receiving.

The Solicitor General proposes a largely more favorable standard in terms of protecting employees from Lockheed's attempt to obtain extra consideration for itself from assets held in trust for the employees. But the Solicitor General's standard would still unnecessarily and unpredictably allow employers to obtain consideration that is not an incident of service or termination of the employment relationship. Whether a condition departs "substantially" from the "paradigm" of pensions in exchange for the employee's service and retirement (Br. at 16-17) is an unnecessarily lax and unpredictable test. The Solicitor seems to have been attracted to a position that

allows some departures from the rule because the IRS previously ruled that a non-compete clause does not violate certain tax-qualification rules. However, the IRS did not address the issue of whether this additional consideration constituted a prohibited transaction.[7] The fault with the Solicitor's proposed standard becomes more apparent when the Solicitor announces, several sentences later, a willingness to permit employers to require employees to waive their ADEA claims in exchange for pension benefits, while holding firm on the waiver of race and sex discrimination and common law tort claims. Br. at 24-25. There is no support or rationale for these breaks in the Solicitor's standard.[8]

A. Assets Held in Trust for the Exclusive Benefit of Employees and their Families May Not Be Conditioned on the Delivery of Valuable Extra Consideration to the Employer Beyond an Employee's Labor or Retirement

NELA's position is that ERISA does not permit an employer to take trust assets and exchange them for anything

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[7] *See, e.g.*, 58 Fed Reg. 46,773, 46,778 (September 3, 1993) (compliance with nondiscrimination regulation does not assure compliance with Title I of ERISA).

[8] Lockheed's, the Solicitor General's, and amicus ERIC's briefs all sound as though the IRS has permitted ADEA waivers as a condition under early retirement windows. Lockheed Br. at 28; SG Br. at 22 n.15; ERIC Br. at 21 n.18. The mention of waivers is, however, in connection with an unrelated test on the "current availability" of a benefit to non-highly compensated employees. 26 C.F.R. 1.401(a)(4)-4(b)(2)(ii)(B) (1995). Even if the citation can be read to imply that IRS is aware that some employers have done this, IRS non-discrimination rulings do not affect ERISA Title I, as the IRS states.

other than service or retirement - the natural incidents of pension plans. NELA's position leaves the prohibited transaction rule with the broad sweep that Congress intended: The "crucible of congressional concern" in enacting ERISA was "the misuse and mismanagement of plan assets by plan administrators." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985). Congress intended to ensure that trust assets are used for the exclusive benefit of the plan's participants and it designed a *per se* rule to prevent the use of trust assets for the benefit of the plan sponsor or other parties in interest. See *Commissioner v. Consol. Industrial*, 113 S. Ct. 2006, 2112 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan"); *Cutaiar v. Marshall*, 590 F.2d 523, 529-30 (3d Cir. 1979) (§ 406(a) is designed to prevent transactions for the benefit of parties-in interest that offer a high potential for abuse of a trust assets); *M&R Investment Co. v. Fitzsimmons*, 685 F.2d 283, 287 (9th Cir. 1982) (the transactions in § 406(a) are transactions with plan assets that may not be at arm's length; the statute presumes such transactions are not for the plan's exclusive benefit); *Beck v. Levering*, 947 F.2d 639, 641 (2d Cir. 1991) (transactions in § 406(a) are per se violations of ERISA regardless of the motivation that caused the transaction to be initiated, the prudence of the transaction, or the absence of any harm from it).

Once an employer contributes money to a pension plan, the assets are to be held in trust exclusively for the benefit of the participants and beneficiaries. Use of plan assets for the benefit of parties-in-interest is prohibited. It should be emphasized that the prohibited transaction rule violation in cases like this does not arise from the payment of benefits to the participants. It arises because the benefits are conditioned on the delivery of

consideration, other than labor and retirement, in favor of the party-in-interest employer. The extraneous conditions cause plan assets to be exchanged not for the employee's labor and retirement but for other consideration going to the employer's account. Use of the assets to extract valuable consideration for the employer and other parties-in-interest violates the prohibited transaction rule.[9]

The exemptions in ERISA Section 408 are designed to alleviate the prohibited transaction rule's sweep where appropriate. As already discussed, the prohibited transaction rule does not prohibit the exchange of assets for labor or retirement consistent with the terms of the plan as applied to all participants and beneficiaries. If additional leavening is needed, the Department of Labor is given authority under ERISA Section 408(a) to adopt class and individual exemptions under the standards cited above.[10]

Since ERISA was enacted, business associations have gone to Congress several times asking Congress to eliminate or modify the prohibited transaction rule, contending that its *per se* nature encompasses many beneficial transactions. They contend that the statutory exemptions are too narrow and that going to the Department of Labor for exemptions is cumbersome. *See, e.g*, Hearing on S. 1541 Before Senate Subcommittee on Labor, January 26, 1982. To date, Congress has not responded with

[9] *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 333 (1981) ("fiduciary requirements of ERISA ... specifically insulate the trust from the employer's interest").

[10] The Labor Department has issued several class exemptions allowing employers limited financial benefits in plan transactions. *See* Donald Myers, *ERISA Class Exemptions* (BNA 1991).

repeal or modification of the rule. This Court should not modify ERISA Section 406(a) through a judicial decision.

Several amici postulate other hypotheticals that they find more difficult than this case. See Chamber of Commerce Br. at 10-11. None of the hypotheticals seem to involve the situation where the plan is amended to demand that the employee/participant transfer additional, non-incidental consideration to a party-in-interest as a condition to receiving plan benefits. While there could always be a future case where it is more difficult to determine whether plan assets are being exchanged for additional, non-incidental consideration to the employer, it should be emphasized that this is not a hard case: Lockheed is effectively "writing checks drawn on pension funds to buy the releases in question." JA 90.

A holding for Lockheed would allow employers to attach any manner of new conditions to the payment of pension benefits, as illustrated above, with the consideration flowing to the settlor/employer. In any irrevocable trust, however, trading trust assets for something of value for a party-in-interest is a breach of trust, however understandable the party-in-interest's motives are. One cannot place assets in an irrevocable trust for an estate's tenants and later add conditions to the receipt of trust assets to extract their agreement not to challenge the settlor's rents or sue the settlor for personal injuries. *See* Bogert, *Trusts* (6th ed.) §§ 145 and 148. If pension assets held in trust can be used on behalf of the employer/settlor to liquidate statutory and common law causes of action (with penalties for violating the waiver), ERISA will be pushed far from its purpose of protecting the interests of participants in employee benefit plans by establishing standards of conduct, responsibility and obligation for fiduciaries of such plans. ERISA Section 2(b), 29 U.S.C. §

1001(b); *Varity Corp. v. Howe, supra,* 64 U.S.L.W. at 4140.

B. Lockheed's Amendment of the Plan to Dispose of Plan Assets Conditioned on Receipt of Valuable Consideration for its Own Account Violated ERISA's Prohibited Transaction Rule

Over the last 20 years, the lower courts have strictly enforced ERISA's prohibited transaction rules to prevent their "erosion," *Lowen v. Tower Asset Mgmnt, Inc.*, 829 F.2d 1209, 1215 (2d Cir. 1987), notwithstanding presentations by defendants of unobjectionable aspects to the transactions. The most common prohibited transaction is probably a loan of plan assets to a financially-strapped employer. In many cases, the employer argues that the loan appeared to be a good investment for the pension plan and that it was the only way to save jobs and, ultimately, the pension plan. But the prohibited transaction rule says that the use of plan assets for the employer's benefit is prohibited unless an exemption specifically permits it. *See, e.g., Freund v. Marshall & Ilsley Bank,* 485 F. Supp. 629 (W.D. Wis. 1979). In other cases, the transaction may be to transfer surplus pension assets to shore up a faltering health plan. But the courts have held that ERISA prohibits such transactions. *See Cutaiar v. Marshall, supra.* Virtually all of the prohibited transaction cases decided in the past 20 years would be effectively eliminated if employers could just adopt amendments directing the fiduciaries to engage in the prohibited transaction and thereby avoid the statutory rule. Following the logic of Lockheed's argument, the employer could, for example, simply adopt an amendment directing a fiduciary to lend the money to the employer.

The Solicitor General argues that Lockheed's action in

adopting the general release amendment is a non-fiduciary function, while the action of implementing the amendment is clearly a fiduciary one. NELA agrees with the second part of the Solicitor's position. But while the first part may not ultimately affect the outcome of this case,[11] NELA disagrees with it. This Court has never held that an employer who adopts an amendment directing a violation of ERISA can, under no circumstances, violate a fiduciary duty. It should not do so now. All of the cases cited by Lockheed and its amici for the proposition that amendments are not breaches of fiduciary duty deal with amendments that do not violate ERISA and do not exchange trust assets for extraneous consideration for the employer. In *Curtiss-Wright v. Schoonejongen*, 115 S.Ct. 1223, 1228 (1995), this Court said that an amendment is "generally" not a fiduciary function, but the Court did not address the situation where the amendment violates law.

NELA's position is that when an employer dictates fiduciary administration and disposition of trust assets through an amendment it is functioning as a fiduciary and is subject to liability as such. ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), provides that a person is a fiduciary with respect to a plan to the extent it exercises any authority or control

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[11] Even if this Court held that Lockheed is never a fiduciary in amending the plan, Lockheed is responsible under ERISA because (a) it functioned as a fiduciary in implementing the plan provisions (see note 12), and (b) even if the members of its retirement committee had performed all implementation functions, Lockheed would be subject to equitable relief as the party-in-interest who received consideration in the prohibited exchange (SG Br. at 5, n.2).

respecting management or disposition of the plan's assets.[12] Many circuit decisions, which have not been cited by Lockheed or the Solicitor General, have held that amendments disposing of plan assets in the interest of an employer or another party-in-interest are exercises of fiduciary authority under ERISA. These decisions should not be ignored. See *Struble v. New Jersey Brewery Employees' Welfare Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984) (management trustees who voted for plan amendment giving trust assets to contributing employers rather than using them for participants breached fiduciary duty); *Delgrosso v. Spang & Co.*, 769 F.2d 928, 938 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986) (employer amendment of pension plan to take reversion of assets breached fiduciary duty when amendment exceeded employer's authority under collective-bargaining agreement); *Brock v. Hendershott*, 8 EB Cas. 1121, 1122-23 (S.D. Ohio 1987), *aff'd*, 840 F.2d 339 (6th Cir. 1988) (adoption of plan provision requiring employees to go to dental service provider in which union officials owned interest was breach of fiduciary duty because it dealt with plan

[12] Case law also recognizes that an employer may function as a fiduciary administering the plan by taking actions that supplant the functions of an employer-selected and controlled committee of fiduciaries. *E.g.*, *Foulke v. Bethlehem 1980 Salaried Pension Plan*, 565 F. Supp. 882, 883 (E.D. Pa. 1983) (if corporate employer has functional role, along with retirement committee, in administration, both are fiduciaries); *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995) (corporation may have supplanted committee in selecting annuity carrier).

In this case, the Plan document expressly provided that Lockheed, and not the members of the Committee, would perform the administrative functions connected with the general release condition to benefit payments, including drafting the release with terms "acceptable to the employer." JA 50.

assets for their benefit); *Hickerson v. Velsicol Chemical Corp.*, 778 F.2d 365, 377 (7th Cir. 1985), *cert. denied*, 479 U.S. 815 (1986) (employer had fiduciary duty in amending profit-sharing plan not to engage in "self-interested plan administration" and therefore had duty not to impair value of participants' accounts and not to use money for its own interests); *ACTWU v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988) (amendment redirecting surplus assets as part of greenmail scheme may violate ERISA Section 406 because it uses plan assets to further interests other than those of participants); *Eaves v. Penn*, 587 F.2d 453, 455 and 458 (10th Cir. 1978) (amendment that converted profit-sharing plan to ESOP violated employer's fiduciary duty by diverting existing plan assets for employer's benefit).[13]

Even some of the decisions on which Lockheed relies recognize that while in the cases before them the employers did not have fiduciary duties, employers may have such duties when adopting amendments that dispose of existing plan assets for the employers' own account. *See Musto v. American Gen. Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, 490 U.S.

[13] *See also In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1208-10 (S.D. Tex. 1991) (amendment transferring plan assets to a pension plan to be established by purchaser of division with reimbursement to seller rather than plan if asset transfer exceeded a certain amount was prohibited transaction); *Werschkull v. United Cal. Bank*, 149 Cal. Rptr. 829 (Cal. App. 1978) (amendment shifting excess assets to another plan of employer breached state law fiduciary duty).

The same view existed at the time ERISA was enacted. *E.g.*, *Hales v. Winn-Dixie Stores, Inc.*, 500 F.2d 836, 843 (4th Cir. 1974) (power to "modify" a pension plan gives employer "ultimate control over how the Program monies will be managed and disposed of").

1020 (1989) ("when, as here ... there is normally no plan asset pool to be affected ... the company normally acts in its role as employer, not in its role as fiduciary; but suggesting that amendments that "affect the allocation of a finite plan asset pool" may be are subject to fiduciary duties); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1159 (3d Cir. 1990) ("Because the severance plan at issue in this case was unfunded, there is no question regarding the management or investment of a separate trust"); *Sutton v. Weirton Steel Div. Of National Steel Corp.*, 724 406, 411 (4th Cir. 1983) ("it is the unfunded nature of [the employer's] contingent liability that distinguishes this case from the cases ... where courts have found that fiduciaries have violated § 1106"); *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) ("[i]n general, an employer that decides to ... amend ... a plan does not act as a fiduciary ... provided that ... the amendment does not otherwise violate ERISA or the express terms of the plan").[14]

Lockheed's amendment of the plan in order to use plan assets to obtain general releases for its own benefit is also a breach of fiduciary duty because under the express terms of its pension plan. Lockheed obligated itself to act as a "named fiduciary" when it provided that as a "named fiduciary" it had the "authority and responsibility" for "amendment of the Plan

[14] The Chamber of Commerce exhibits similar unease with the sweeping assertion Lockheed makes. Chamber Br. at 13 n.5 (it is "unnecessary in this case to make the more sweeping assertion that all amendments represent an exercise of the settlor function. ... We leave for another day the question of whether an amendment ... [that] invade[d] the traditional trustee function would likewise be exempt from the fiduciary duties"). *See also* Chamber Br. at 14 (recognizing common law rule that settlor cannot implement trust terms that "run counter to any rule or policy of the law").

and the Trust Agreement." JA 46. The circuit courts have uniformly held when the entity or person who adopts an amendment is obligated to act as a fiduciary when it performs the function of amending the plan, it must be held to that standard. *See, e.g., Elser v. Machinists National Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983); *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032 (2d Cir. 1985).

The plan document in this case clearly shows that Lockheed had a fiduciary duty not to violate ERISA when it adopted plan amendments disposing of trust assets. Under the plan document, Lockheed is first designated as a "named fiduciary" with respect to the plan. JA 45. Lockheed's plan then unequivocally provides that Lockheed as the "named fiduciary" has the "authority and responsibility" for "amendment of the Plan and Trust Agreement" and for "qualification of the Plan under applicable law." JA 46; *see also* JA 47-48.[15]

Thus, Lockheed acted as a fiduciary when it adopted the general release condition under the early retirement incentive provisions of the pension plan (as well acting as a fiduciary when it implemented the general release amendment). As such, it "caused" the plan to enter into prohibited transaction in violation of ERISA Section 406(a).[16]

[15] In light of these provisions, Lockheed's categorical representation that "it did not act in a fiduciary capacity when it amended the Plan" to condition benefits on general releases, Br. at 12, is plainly incorrect.

[16] Under ERISA, "named fiduciaries" are responsible if they enable other fiduciaries to commit breaches by failing to comply with ERISA § 404(a)(1). ERISA §§ 405(a) and (c)(2)(B), 29 U.S.C. §§

C. It Is Illegal Through a Plan Amendment, or Its Implementation, to Dispose of Trust Assets Conditioned on Additional Consideration for a Party-in-Interest

It is illegal through a plan amendment or through its administration to use trust assets in a manner that violates ERISA's prohibited transaction rule. An employer cannot avoid the statutory prohibitions by the expediency of adopting an amendment that dictates that another fiduciary implement the prohibited transaction for the employer. The Solicitor General agrees, at least, that it is a prohibited transaction to implement an amendment that uses trust assets for a party in interest's benefit. Lockheed effectively acknowledges this, too: In footnote 11 of its opening brief, Lockheed concedes that a fiduciary's implementation of an amendment that violates ERISA breaches the fiduciary's duty to act consistently with ERISA. Once Lockheed concedes this, the only argument that it can make is that the adoption of this amendment is not a breach of fiduciary duty, while its implementation may be. Ultimately, this hair-splitting gains Lockheed nothing. Even if Lockheed wins with its "settlor" argument, it loses because Lockheed and the members of the Retirement Committee

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1105(a) and (c)(2)(B). ERISA § 404(a)(1) provides, in pertinent part, that a fiduciary must discharge its duties consistent with the provisions of ERISA Title I, which includes the ERISA § 406 prohibited transaction rule.

Named fiduciaries must also make reasonable efforts to remedy a breach by another fiduciary of which they have knowledge. *Id.* A named fiduciary cannot therefore adopt a plan amendment directing a violation of ERISA and then stand passively by while another fiduciary implements it.

implemented the general release amendment and "caused" the plan to engage in the prohibited transaction.[17]

Some amici, but notably not Lockheed, argue that the Court should distinguish between the liability of a fiduciary for causing a prohibited transaction and that of a party-in-interest for engaging in the transaction. This issue is not before the Court.[18] The reason Lockheed has not raised it is clear: Lockheed was literally on every side of this transaction (except the employee's). Lockheed was the party-in-interest who received the releases demanded as a condition of receiving the special early retirement benefits. It was the "named fiduciary" who adopted the amendment. It was the "named fiduciary" who selected, and may remove at will, the members of the Retirement Plans Committee who administer the Plan's terms.[19] As mentioned, in this case, Lockheed assigned itself, rather than the members of the Committee, the administrative responsibilities connected with the release condition under the Plan. See n. 12.

The arguments by Lockheed and amici ERIC and EEAC

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[17] Indeed, even if the Retirement Committee, and not Lockheed, had handled implementation of the release condition for the plan, ERISA Section 406(a) would be violated because a fiduciary caused the plan to engage in a transaction that delivered non-incidental consideration to Lockheed as a party-in-interest.

[18] As the Solicitor General notes, this issue was not in the petition for certiorari. SG Br. at 5, n.2. *See* Sup. Ct. Rules 14.1(a) and 24.1(a) and, e.g., *Varity Corp. v. Howe*, 64 U.S.L.W. at 4140 (breach of fiduciary duty to workers who were already retired was not fairly within scope of questions Varity posed in its petition).

[19] Lockheed also indemnifies the members of the Retirement Plans Committee whom it selects from any liability for breach of fiduciary duty in implementing plan terms. § 13.05 of Plan.

that Congress enacted the Older Workers Benefit Protection Act (OWBPA) of 1990 to allow employers to obtain general releases without violating the prohibited transaction rule are fanciful. Congress did not take any action in OWBPA to change ERISA Section 406, nor did it discuss in the legislative history allowing trust assets to be used for non-trust purposes. Congress evidently presumed that employers were purchasing releases with assets that were not held in trust for other purposes, as we presume as well.[20]

The threats by Lockheed and its amici that they may stop offering early retirement incentives from pension plan assets held in trust unless they are allowed to condition plan benefits on general releases in the employer's favor, and that litigation will dramatically increase unless they prevail on this issue, are similar to the threats that were heard before ERISA's enactment and with every major case and every employee benefit legislative reform since then (e.g., the 1984 REA, the 1986 Tax Reform Act, and the 1986 OBRA) . In *Varity Corp. v. Howe*, the defendant and some of its amici pictured a dramatic increase in plan costs and litigation in practically the same language as used in this case.

[20] Petitioner offers no statistical evidence in its brief that a significant number of employers besides Lockheed are exchanging pension trust assets for general releases. Because this case is here on a Rule 12(b)(6) motion, Lockheed has not introduced any evidence in the district court either.

II. The Reduction of Spink's Benefit Accruals Violates the Rule in OBRA Sections 9201 and 9202 Against Limiting the Years of Service or Participation Taken into Account in Determining Pension Benefit Accrual on the Basis of an Employee's Attainment of Any Age

Congress enacted the pension provisions of OBRA, P.L. 99-509, §§ 9201-9204, in 1986 to protect older workers from arbitrary discrimination under private pension plans on account of having attained older ages. Before OBRA, Lockheed maintained a provision in the pension plan that on its face excluded employees like Paul Spink from pension plan participation who were hired after a certain age -- which was age 60. Unlike the other design specialists with whom he worked, including some who were just a few years younger than him, Spink would not be paid pension benefits as part of his compensation because of his age. The Lockheed pension plan as in effect on January 1, 1979 provided that:

> Notwithstanding any other provision of the Plan to the contrary, no Employee may become a Member if he commences employment on or after December 25, 1976, and, at the time of such commencement of employment, is sixty (60) years of age or older.[21]

[21] JA 58. Before OBRA, the Department of Labor ruled that exclusions like this did not violate the ADEA so long as they were non-discretionary. 29 C.F.R. 1625.10(c). Lockheed's exclusion may not have been non-discretionary since Lockheed made exceptions to it for "special groups" of employees in Section 15 of the Plan document. The exclusion was not "equally applied to all employees of the same age." *Id.*

OBRA's reforms for all older workers became effective with the first "plan year" beginning on or after January 1, 1988.[22] Since Lockheed employed Paul Spink in a "covered group" of employees[23] and he was not otherwise ineligible, OBRA required Lockheed to make Paul Spink a plan participant. The plan year for Lockheed's pension plan begins on December 25th of each calendar year. Thus, the OBRA amendments became effective for Lockheed's employees who had an hour of service on or after December 25, 1988.

Although OBRA became effective on December 25, 1988, Lockheed did not adopt the amendments to conform its pension plan with the law until December 17, 1990, nearly two years after OBRA became effective. JA 38-39 and 42. Lockheed's December 17, 1990 amendment complied with OBRA by formally eliminating the plan provision that excluded older employees like Spink from plan participation. The Plan as amended December 17, 1990 provides:

> An Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988 shall become a Member on December 25, 1988....

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[22] Under ERISA, the "plan year" is like a corporation's fiscal year; it is the "calendar, policy, or fiscal year on which the records of the plan are kept." 29 U.S.C. § 1002(39).

[23] A "covered group" means, in pertinent part, all employees who are compensated by Lockheed on a salaried basis for employment in the United States. Lockheed Plan § 1.09.

A. Lockheed's Refusal to Credit Pre-December 25, 1988 Service to Spink Violates the OBRA Rules on Limiting Accrual Credits Based on Age

In its 1990 amendments, Lockheed included an additional clause that no party contends OBRA required, and that Spink contends violates OBRA (Lockheed contends OBRA permits or tolerates the amendment). This amendment added:

> An Employee who was excluded from the Plan under Section 2.01 as in effect prior to December 25, 1988 .. shall not receive Credited Service [under the benefit accrual formula in Section 6] for his pre-Member service.

This is the part of the amendment at issue in this case.

In calculating the amount of an employee's pension benefits, Lockheed "in general" only counts periods of Member service. JA 42-43. But this generalization does not reveal two details. First, the only years of service within a "covered group" that Lockheed does not count as Member service appear to be those of Paul Spink and employees like him who were hired after age 60. *Id.* Second, Lockheed actually credits years other than those worked as a Member in the Plan in calculating benefit accruals in some cases. In fact, Lockheed even goes so far as to count some years when employees were not employed. The most notable examples are its voluntary and special early retirement plans adopted just months before the December 17, 1990 amendment: Under those early retirement incentive plans, Lockheed counts three extra years of credited service when employees were neither Members of the Plan nor even employees. JA 51-52 and 56. Lockheed also counts years of service when the individual was not a Member of the Plan under

Section 15.01 and under Section 4.03 of the Plan document.[24]

Spink contends that the amendment violates OBRA because it singles him out for reduction in the rate of his benefit accruals on account of his attainment of a certain age.[25] OBRA Sections 9201 and 9202 mandate that a pension plan may not reduce an employee's rate of benefit accrual on account of the attainment of any age.

The Ninth Circuit held, in this case of first impression, that denying an employee credited years for benefit accruals on the basis of a prior age-based exclusion reduces the rate of benefit accruals for that employee on the basis of the attainment of a certain age. The Ninth Circuit applied *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), and held that it only needed to reach the first step of the *Landgraf* model because "Congress has expressly prescribed the statute's proper reach," *Landgraf* at 1505, when it "manifested," in the statutory text, the act's structure and the legislative history, the "intention that pre-enactment service years be included in calculating benefit accrual for older employees" like Spink. JA 82 and 86. The Ninth Circuit found in particular that the statutory provision on the effectiveness of Sections 9201 and 9202 made the rule

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[24] Section 1.28(D) of the Lockheed Plan provides that rules crediting an employee with service for periods when he is not working are to be applied "in a nondiscriminatory fashion to all Employees."

[25] Spink also contends that Lockheed's amendment is not applicable to him for a reason that is not currently before the Court: Spink was promised he would receive benefits for those years when he was hired away from Hughes Aircraft in 1979. For the first four years of his employment, Lockheed gave Spink benefit statements showing credits under the pension plan. JA 78.

against discrimination in benefit accrual effective for "employees who have 1 hour of service in any plan year to which the amendments apply," whereas the provision on exclusion from participation in Section 9203(a) was effective "only with respect to service performed on or after [the effective date]."

B. Lockheed's Defense Would Remove the Protection in OBRA Sections 9201 and 9202 Against Limiting Accrual Credits on the Basis of Age

Lockheed now asks this Court to reverse the Ninth Circuit's decision and rule that OBRA Sections 9201 and 9202 do not prohibit the reduced rate of benefit accrual for Spink on account of his attainment of age 60. Lockheed offers three principal arguments that NELA addresses sequentially. It is important to point out first, however, that Lockheed appears to concede now that the benefit accrual rules in OBRA Sections 9201 and 9202 "apply to all years of service (including years of service before January 1, 1988) completed by a participant ... who has at least 1 hour of service ... in a plan year ... beginning ... after January 1, 1988." Br. at 44 (quoting IRS Notice 88-126, 1988-2 C.B. 538, with approval and stating that Lockheed has "relied" on it). What Lockheed contends is (1) that Spink's cause of action is not under those sections, but only under OBRA Section 9203(a), or (2) that if it is under those sections, Congress intended an exception to the retroactive application of Sections 9201 and 9202 for older employees like Spink who were hired after the age of 60, even if the statutory text does not manifest that distinction.

To advance its arguments, Lockheed first contends that a reduction in the "rate" of benefit accrual under OBRA Sections 9201 and 9202 is limited to a direct reduction in a

percentage rate, e.g., OBRA only applies if the 1-1/2 percent element in § 6.01A of its Plan is reduced to 1 percent for all years of credited service. This argument is easily rebutted. Before and after OBRA, ERISA prescribed limits on an employer's ability to vary a pension plan's "annual rate" for service in different years. ERISA Section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B), provides that the "annual rate" of benefit accrual for service in a later year may not be more than 133 1/3 percent of the annual rate for any earlier year. This rule is directed at plans that apply different annual rates of accrual to different years, either directly or indirectly. *See also* H. Conf. Rep. 1280, 93d Cong. 2d Sess., 275, 3 ERISA Leg. Hist. 4541. A benefit formula that produces "virtually no benefit" for an employee's service in the early period of employment because of an offset of other benefits violates this rule, even though the nominal percentage rate (2.4 percent of pay in this Ruling) is the same for all employees. Rev. Rul. 78-252, 1978-1 C.B. 123.[26]

The succeeding subsection of OBRA provides, moreover, that an employee's rate of benefit accrual is not considered to be reduced "solely because the plan imposes" a "limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan" as long as the limitation is "without regard to age." OBRA Sections 9201 and 9202. This exception would not have been necessary if Congress intended that a limitation on years of service that is based on age could not be considered a reduction in the rate of benefit accruals.

[26] In *Davidson v. Canteen Corp.*, 957 F.2d 1404, 1407 (7th Cir. 1992), the Seventh Circuit also held that a change in a plan's compensation definition can reduce the rate of future benefit accrual in violation of ERISA Section 204(h).

Thus, offering a lower annual rate of benefit accrual for service in certain plan years is precisely the kind of reduced rate of benefit accruals that ERISA and OBRA contemplate and cover. For an employee like Spink, Lockheed's annual rate of benefit accrual is, pursuant to Lockheed's 1990 amendment, 1-1/2 percent of his "excess" salary for his service after 1988, but zero percent of his salary for his service in plan years before 1988. This is a reduced rate of benefit accrual on account of the attainment of a certain age.[27] It is a reduction in the rate of benefit accrual because it limits "the number of years of service ... which are taken into account for purposes of determining benefit accrual under the plan" on the basis of Spink's age when hired. As a result, the Ninth Circuit found that "Spink's credited service was calculated as lower than that of a younger employee's because [Spink] was denied credit for all years of his employment in a Covered Group" and held that "[s]uch an age-based reduction in the rate of accrual is the essence of OBRA's express prohibitions." JA 83.

Lockheed's second argument is that the December 17, 1990 amendment could not have "reduced" Spink's rate of benefit accrual for his years of service before 1988 since he was not a Member of the Plan before December 25, 1988. In syllogistic terms, Lockheed and its amici advance the following argument: Spink was not a "participant" until OBRA took effect in 1988. ERISA computes accrued benefits based only on "years of participation." Spink can only have "years of participation" after he became a participant. Therefore, it follows that

[27] In Rev. Rul. 78-252, *supra*, a formula that produced "virtually no benefit" for the first 25 years of service and greater benefits for service thereafter provided a differential in the "annual rate" of benefit accrual that violated ERISA.

his rate of benefit accrual could not have been reduced by the amendment. Lockheed Br. at 34; Chamber Br. at 23..

This argument has several faults. First, accepting it defeats the Congressional goal of stopping discrimination in pension plans based on the attainment of older ages. The most telling flaw in Lockheed's argument that Sections 9201 and 9202 do not apply is shown by an example: Suppose that in 1988 an employer like Lockheed stopped excluding employees like Spink who were hired after the age of 60 from its pension plan. It has now been ten years since OBRA was enacted. What OBRA sections prevent the employer from deciding to count only the employee's years after age 60 to determine benefit accruals under the plan? NELA respectfully submits that the answer is only OBRA Sections 9201 and 9202, the sections that prevent an employer from limiting credit for years of service on the basis of age. This confirms that Spink looks to the proper OBRA sections to correct his benefit accruals.

Lockheed's syllogism also rests on erroneous premises (1) that OBRA's protection of older workers against reductions in the rate of benefit accruals is limited to the rate of accrual for "years of participation" instead of the rate of accrual for any "years of service ... which are taken into account for purposes of determining benefit accrual under the plan"; and (2) that Lockheed counts only "years of participation" in computing accrued benefits. First, OBRA Sections 9201 and 9202 expressly recognize that plans compute benefits based on both years of service and years of participation. These sections provide that a plan shall not be treated as reducing the rate of an employee's benefit accrual "solely because the plan imposes (without regard to age) ... a limitation on the number of years of service or years of participation which are taken into account for

purposes of determining benefit accrual under the plan." In the instant case, Spink's rate of benefit accrual was reduced because of a limitation on the number of years of service taken into account for purposes of determining benefit accrual. Lockheed imposed that limitation expressly with regard to his age.

Second, Lockheed's plan, in fact, counts years of "credited service" in computing benefits that were not served as a Member of the Plan (or even as an employee of the company). As mentioned, the most notable examples are in its early retirement incentive provisions where credited service is given for years when the individual was not a member of the Plan. *See* Sections 15.02 and 15.03 of the Plan. Lockheed does not limit years used to compute benefits to years of participation across-the-board. It cannot limit them on the basis of age just for Spink's group.

Lockheed's last argument is that OBRA Section 9203 and the lack of retroactivity in the related effective date in Section 9204(b) would not have their intended effect unless Sections 9201 and 9202 are interpreted to mean that employees who companies had excluded from participation may be denied credited service for years of employment prior to their inclusion. However, Lockheed is merely assuming this intended effect. There is no evidence that Congress possessed this intent. The lack of retroactivity in OBRA Section 9204(b) serves a very important function that the Ninth Circuit's decision preserves. The lack of retroactivity in Section 9204(b) allows a pension plan to start with a 1988 participation date in using the rule in Section 9203(b) on "Delayed Normal Retirement Age for Individuals Commencing Plan Participation Within 5 Years of Attaining Normal Retirement Age." Indeed, Section 9204(b) is headed "Applicability of Amendments Related to Normal

Retirement Age."

In effect, Lockheed asks for an exception to OBRA Sections 9201 and 9202 that would provide that a limit on years of service based on an employee's age when hired will not be considered a reduction in the rate of benefit accrual. The Senate bill provided that the prohibition on age-based reductions in rates of benefit accrual would only apply to accrual computation periods after 1986, but the Conference Committee removed that limitation. H. Conf. Rep. 1012, 99th Cong., 2d Sess., 382, *reprinted in* 1986 U.S.C.C.A.N. 4019, 4027; *see also* 132 Cong. Rec. S13176 (Sept. 19, 1986) (Senate Amendment 2863, §§ 10-12). Lockheed's suggestion that Spink's claim should be considered as if it fell under Section 9203(a) is also contradicted by the text of that Section: Section 9203(a), in contrast to Sections 9201 and 9202, nowhere refers to the rate of benefit accrual or limits on years of service or participation on the basis of age in computing benefit accruals. Accordingly, the Ninth Circuit rejected Lockheed's invitation to carve an exception to OBRA's benefit accrual rules based on the previous wholesale exclusion of older workers. The Ninth Circuit observed that it could not comprehend "any logical reason why Congress would not include a limitation in the immediately preceding subsection [on the effective dates for the benefit accrual standards in Sections 9201 and 9202] which would *directly* limit the application of the benefit accrual standards, but [would] instead include a temporal limitation in § 9204(b), *indirectly* limiting the application of [those] standards." JA 86.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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